93-872

Supreme Court, U.S.
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No. 93-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

MARIE J. SMITH, a single woman,

Petitioner,

vs.

U.S. Veteran's Administration, an Executive Department of the Federal Government; WILLIAM L. EBERLE, Chief, Personnel Service, Department of Veteran's Affairs,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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November 1, 1993

QUESTIONS PRESENTED

Petitioner Marie J. Smith filed and served a complaint against Respondent alleging causes of action based upon *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) and the Federal Tort Claims Act, 28 U.S. § 2671 *et seq.* The U.S. Ninth Circuit Court of Appeals affirmed the trial court, but for a different reason. Relying on *Bush v. Lucas*, 462 U.S. 367 (1983), it held that the trial court had no subject matter jurisdiction. That decision invites this petition because it is acknowledged by the Ninth Circuit that Respondent did not follow the elaborate comprehensive scheme established by Congress to protect people such as Petitioner from wrongful termination. The following questions are presented:

Does *Bush v. Lucas* hold that a U.S. District Court has no subject matter jurisdiction over a Bivens claim or an FTC claim against a federal agency which chooses

to ignore 5 U.S.C. §§ 7511-7513, 7701-7703, and 5 C.F.R. §§ 1201.21 through 1201.26. Does the opinion of Justice Marshall, joined by Justice Blackman, hold open the door of subject matter jurisdiction of a Bivens claim when an injury results that is not attributable to personnel actions which may be remedied under the federal statutory scheme.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASON FOR GRANTING THE WRIT . . .	5
Bush v. Lucas Does Not Deal With a Federal Agency Ignoring the Procedural Statutes Established By Congress . . .	5
CONCLUSION	8
APPENDIX	Attached

TABLE OF AUTHORITIES

1. CASES: PAGES

Bivens v. Six Unknown Fed. Narcotics Agents 403 U.S. 388 (1971) i

The Federal Tort Claims Act 28 U.S. § 2671 et seq. i

Bush v. Lucas 462 U.S. 367 (1983) i,1, 3,5,6,7,8,9

Berry v. Hollander 925 F.2d 311 (9th Cir. 1991) . . . 6

Rivera v. United States 924 F.2d 948 (9th Cir. 1991) . . . 7

Premanchrandra v. United States 739 F.2d 392 (8th Cir. 1984) . . . 7

2. CONSTITUTION:

United States Constitution, Amendment 5 4

3. STATUTES AND REGULATIONS:

5 U.S.C. §§ 7511-7513 and §§ 7701-7703 i

5 C.F.R. §§ 1201.11 through 1201.26 . . . . . i,4,8

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, which is not for publication, appears as Appendix A hereto, bearing case number 92-15294. The District Court Civil Number is CV-90-00276. The order denying a rehearing and rejecting an en banc rehearing appears as Appendix B. The matter appealed to the Ninth Circuit Court of Appeals, attached hereto as Appendix C, is also unreported.

JURISDICTION

This case was decided and judgment was entered by the United States Court of Appeals for the Ninth Circuit on June 24, 1993 and August 26, 1993. The jurisdiction of this Court is invoked under Title 28 of the United States Code § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

These Code and Regulations Sections are the congressionally-mandated enactments referred to in *Bush*, *supra*, ignored by the Agency in this case. The enactments deal with procedure requirements regarding a government employee and with employer conduct relating, in this matter, to termination.

STATEMENT OF THE CASE

Petitioner was solicited by the V.A. Hospital in Tucson, Arizona and subsequently hired as a diagnostic radiological technologist. She filled out the application accurately and completely. Two years later, as a permanent employee, she was terminated without notice and denied an opportunity to be heard because the agency claimed a mistake in hiring a non-citizen. Petitioner had disclosed her Haitian citizenship on her application. After her own efforts failed, and after informing the agency of procedural errors relating to termination, this law suit was filed. Only after litigation was begun, eight months after termination, did the agency notify Petitioner of her right to appeal the termination to the Merit Systems Protection Board. No opportunity was offered Petitioner to file a written response and make an oral presentation to agency officials. No record

was created before litigation for administrative appeal purposes.

The 9th Circuit Court of Appeals could simply have held that the trial court had no subject matter jurisdiction because of the holding in *Bush*. Instead, the 9th Circuit chose to add the last page of its opinion, perhaps as an invitation to this Court to apply the facts surrounding Petitioner with those of Mr Bush. What Respondent should have done from the very beginning is to inform Petitioner of the opportunity to respond and make a record that could be appealed to the Merit System Protection Board. This was not done. After this law suit was filed, the agency advised Petitioner of an appeal to the M.S.P.B. Even at that time there existed no record of proceedings conducted locally to appeal. The only document was a letter of termination which Petitioner had received. The 9th Circuit is being direct in pointing out that the agency did not notify Petitioner of

her administrative remedy. The court's statement is abundantly clear:

> "To make matters worse, once the VA decided to dismiss Smith, they did so without notifying her of her administrative remedy, a clear violation of 5 C.F.R. § 1201.21."

Petitioner did not appeal her termination to the M.S.P.B. but continued to seek judicial relief. Her position has always been that she was denied a property right—her job—without due process of law. This is in violation of the Fifth Amendment to the United States Constitution. During litigation, the VA advised Petitioner of her appeal rights. The 9th Circuit has determined that the notification was prompted by the law suit over which the judicial branch of the government had no subject matter jurisdiction. This court is now asked to determine when, what, and how the congressionally-mandated elaborate and comprehensive scheme is activated so that the judicial branch of the government does not have to supplement a civil servant like

Petitioner with a new judicial remedy. Petitioner seeks a determination that the elaborate scheme must be triggered no later than when the federal agency decides to terminate a permanent employee. Petitioner believes there does exist a new non-statutory damage remedy for a federal employee whose Fifth Amendment right is violated when terminated by a federal agency without being offered the comprehensive scheme beginning at the time the agency decides to terminate. The VA appears to have determined that the Petitioner had no right of due process because of her status as a resident alien from Haiti. The Ninth Circuit is paralyzed because of its view of *Bush*.

2.

REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit Court's memorandum decision expands *Bush v. Lucas* beyond the special factors counselling hesitation

before authorizing a new kind of federal litigation, when it held the trial court would never have subject matter jurisdiction over a federal tort or Bivens claim even though the federal agency chose not to follow the elaborate, comprehensive scheme mandated by congress until after judicial relief was sought by appellant.

2. The facts of this matter are not in dispute. *Bush v. Lucas* does not say expressly or implicitly that the statutory scheme involved will never be supplemented by a judicial recognition of a new cause of action. The underlying facts of this case are perfect for expanding or limiting the holding in *Bush*. The Bush decision predisposes that the federal agency follows the correct statutory procedure mandated by congress. The memorandum opinion refers to *Berry v.*

Hollander, 925 F.2d 311 (9th Cir. 1991), and *Rivera v. United States*, 924 F.2d 94[illegible] (9th Cir. 1991). Not cited is *Premanchrandra v. United States*, 739 F.2[illegible] 392 (8th Cir. 1984). In all of these cited cases, the federal agency followed the correct procedures established by congressional mandate. The civil service remedies were the exclusive means of redress. *Bush v. Lucas* does not hold that the civil service remedies are the exclusive means of redress when the federal agency chooses to ignore those remedies until after judicial relief is sought.

3. The policy judgment adopted by this court in *Bush* emphasized that congress intended that the procedural remedies would put the employee "in the same position he would have been in had the unjustified or erroneous personnel action not taken

place." Unless this court amplifies *Bush*, any federal agency could terminate a permanent employee and choose to ignore the procedural requirements of notice and an opportunity to contest the termination. In this case, the agency has benefitted from *Bush* in a way that congress could not have imagined: ignore the elaborate scheme and initiate it only when judicial relief is sought from a remedy that does not exist. According to §§ 5 C.F.R. 1201.21 and 1201.22, time limits and effective dates are considered important. They apparently are not important to the Veteran's Administration.

CONCLUSION

In drafting the opinion for *Bush v. Lucas*, Judge Stevens had to decide if anything was missing in the procedural scheme adopted

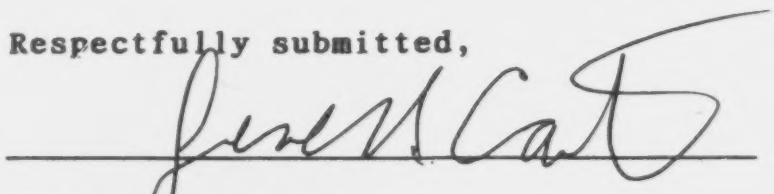
by congress for the protection of the civil service employee. The language contained in the opinion looked at the pro and the con of establishing a judicial remedy that would supplement the procedural steps promulgated b congress. Justice Stevens took the view that supplemental remedy was not propitious in balancing the scales of justice.

This Court must decide if the equation set forth in *Bush* warrants a conclusion in this case that a supplemental judicial remedy is not necessary for the protection of a petitioner when the employer, the VA administration, chooses to ignore the elaborate procedures existing for the benefit of the petitioner. This Court could ignore th Ninth Circuit's finding, which is contained i the last page of its memorandum opinion. Mayb this Court will feel that this case is not important enough. The fact still remains that Petitioner lost her job and the federal agenc

involved chose not to follow procedures established by congress.

Attached hereto as Appendixes D and E are a motion and a statement presented to the Ninth Circuit emphasizing Petitioner's position concerning denial of administrative remedies.

Respectfully submitted,



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APPENDIX

TABLE OF CONTENTS

DOCUMENT	PAGES
Memorandum Decision	1
Order	7
District Court Judgment, Appealed to Ninth Circuit	9
Statement Why Oral Argument Should Be Heard	10
Petition for Re-Hearing F.R.A.P. 40 En Banc Request . . .	15

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARIE J. SMITH, a single woman,	)	No. 9215294
Plaintiff-Appellant,	)	D.C. No. CIV 90-00276-WDB
v.	)	Memorandum*
U.S. VETERANS ADMINISTRATION, an executive department of the federal government; WILLIAM L. EBERLE, Chief, Personnel Department of Veterans Affairs,	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
for the District of Arizona
William D. Browning, District Judge, Presiding
Submitted June 18, 1993**
San Francisco, California

Before: NORRIS and RYMER, Circuit Judges, and TAYLOR, District Judge***

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P.34(a) and Ninth Circuit Rule 34-4.

*** Honorable Gary Taylor, U.S. District Judge for the Central District of California, sitting by designation.

Marie Smith appeals the dismissal o summary judgment of her complaint against a federal employer, in which she alleged a Bivens violation and the tort of wrongful termination. The district court dismissed the action, with prejudice, for Smith's failure t exhaust her administrative remedies. We affir the dismissal, but on a different ground from that given by the district court. We review decisions to grant summary judgment de novo, but can affirm on any ground supported by the record. In re Apple Computers Secur. Litigation, 886 F.2d 1109, 1102 (9th Cir.), cert. denied sub nom. Schneider v. Apple Computers, Inc., 496 U.S. 943 (1990).

When Smith first filed this claim i federal district court, it was dismissed without prejudice so that she would have an opportunity to exhaust her administrative remedies. Congress has established an elaborate statutory remedy for civil service

employees who contest their terminations, including the right to a hearing in front of the Merit Systems Protection Board and an appeal to the Court of Appeals for the Federal Circuit. See 5 U.S.C. §§ 7511-7513, 7701-7703. After Smith's claim was originally dismissed, she did not take it to the Merit Systems Protection Board, however. Instead she filed an amended complaint in this action in the district court.

The district court's dismissal for failure to exhaust implies that the plaintiff could have pursued her cause of action in a district court if administrative remedies had been sought to no avail. The Veterans Administration ("VA") rightly points out that in this case, however, it is the Court of Appeals for the Federal Circuit, not the District Court, which has jurisdiction over Smith's claim if an administrative remedy is not forthcoming. The Federal Circuit is the

forum in which adverse decisions from the Merit Systems Protection Board are appealed. U.S.C. § 7703(b)(1) (1993). Thus the district court erred in stating as its reason for dismissing Smith's action her failure to exhaust administrative remedies.

The proper reason for dismissal was lack of subject matter jurisdiction. The Supreme Court has held that when Congress creates a comprehensive remedial scheme, a Bivens action cannot be used to supplement the scheme. Specifically, because civil service regulations give a federal employee ample protection from arbitrary action by a supervisor, a Bivens action will not lie. Bush v. Lucas, 462 U.S. 367, 368 (1983); see also Berry v. Hollander, 925 F.2d 311 (9th Cir. 1991) (VA pathologist cannot bring Bivens action against employer); Rivera v. United States, 924 F.2d 948, 951 (9th Cir. 1991),

(Civilian Air Force employee cannot bring Bivens action against employer).

Smith's claim under the Federal Tort Claims Act ("FTCA") fails for the same reason her Bivens action does. As we said in Rivera v. United States, 924 F.2d 948, 951 (9th Cir. 1991),

> The clear thrust of Bush . . .is that Congress's purpose in enacting the CSRA [the Civil Service Reform Act of 1978] was to channel grievances and disputes arising out of government employment into a single system of administrative procedures and remedies, subject to judicial review. To permit FTCA claims to supplant the CSRA's remedial scheme certainly would defeat that purpose.

Accordingly, we refuse in this case, as in Rivera, to allow the plaintiff to proceed against her federal employer through the FTCA. In affirming the district court's dismissal of this cause of action, we are not unmindful of the VA's unfortunate treatment of Smith. She was hired and had served out her probationary period before the VA discovered that as a non-citizen she was ineligible for her job. Smith

had clearly written on her application for employment that she was a citizen of Haiti, so no blame for the mistake can be laid at her feet. To make matters worse, once the VA decided to dismiss Smith, they did so without notifying her of her administrative remedy, a clear violation of 5 C.F.R. § 1201.21. Not until two months after this lawsuit was filed and served did the VA advise Smith of her right to appeal her termination to the Merit Systems Protection Board.

Unfortunately, any mistakes made by the VA cannot serve to confer jurisdiction in the district court. We must AFFIRM the dismissal of this case on summary judgment, on the ground that the district court lacked subject matter jurisdiction.

AFFIRMED.

FILED: June 24, 1993

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARIE J. SMITH, a single woman, Plaintiff-Appellant, vs. U.S. VETERANS ADMINISTRATION, an executive department of the federal government; WILLIAM L. EBERLE, Chief, Personnel Service, Department of Veterans Affairs, Defendants-Appellees.	)	No. 92-15294 O R D E R

Before: NORRIS, and RYMER, Circuit Judges, and TAYLOR, District Judge*

The panel, as constituted above, has voted unanimously to deny the petition for rehearing. Judges Norris and Rymer have voted to reject the suggestion for a rehearing en banc, and Judge Taylor has recommended the same.

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* Honorable Gary L. Taylor, United States District Judge for the Central District of California, sitting by designation.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

FILED: August 26, 1993

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

MARIE SMITH

v.

VETERANS ADMINISTRATION

JUDGMENT IN
A CIVIL CASE

Case No. CIV-90
-276-T-WDB

Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

It is ORDERED AND ADJUDGED that plaintiff's motion for summary judgment is DENIED.

IT IS FURTHER ORDERED defendant's motion for summary judgment is GRANTED, and

IT IS FURTHER ORDERED this case is DISMISSED with prejudice.

November 27, 1991 /s/ RICHARD H. WEARE

by Deputy Clerk

FILED: November 27, 1991

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARIE J. SMITH, a single woman, Plaintiff-Appellant, vs. U.S. VETERANS ADMINISTRATION, an Executive Department of the Federal Government, WILLIAM L. EBERLE, Chief, Personnel Service, Department of Veterans Affairs, Defendants-Appellees.	)	No. 92-1529 STATEMENT WHY ORAL ARGUMENT SHOULD BE HEARD

COMES NOW Plaintiff-Appellant in response to the F.R.A.P. 34(a) Order as follows:

The record shows that this appeal is not frivolous; the dispositive issues have not been authoritatively decided; the facts are adequately presented in the briefs and supported by the record, but the legal arguments are much broader than presented in the briefs. The record before this Court shows what happened in the court below. The substantive issue that has never been dealt

with but surrounds this case relates to terminating plaintiff-appellant when she made no misrepresentations as to her Haitian citizenship at the time she was mistakenly hired by the V.A. Hospital in Tucson Arizona.

If the rules of procedure had been followed by the government, plaintiff-appellant would have appealed to the Merit Systems Protection Board after completing the required procedures locally. The Merit Systems Protection Board would then have been faced with a pure legal question relative to termination of plaintiff-appellant after two years of employment when no misrepresentation had been made in the employment application. If the Merit Systems Protection Board had affirmed the termination, then the case would have been reviewed, presumably by this Court. That way, the underlying issue of termination due to the government's own error with respect to the citizenship issue would have been met head-on. Instead, the government chose a

different route: termination without followin the rules. When that did not work and plaintiff-appellant filed the present lawsuit she was advised of her appeal rights in a letter dated July 19, 1990.

This Court is now faced with the issue of the dismissal of plaintiff-appellant's claim for damages against this background. The government is saying that because of the July 19, 1990 letter, the trial court had no jurisdiction. By dismissing this case, the trial court is not dealing with the underlying issue of termination on the grounds of lack of citizenship although plaintiff-appellant never claimed United States citizenship. Unless this Court examines federal procedures regarding government employees, it may not appreciate the intricacy of the employer-employee relationship. Plaintiff-appellant was terminated well after her probationary period was past for a condition that arose before her appointment:

her lack of U.S. citizenship, which she disclosed fully and freely on her application. If this Court takes the trial court's position, it will allow the government to confiscate property without due process of law.

The undersigned believes that oral argument, if the Court is inclined to disagree with plaintiff-appellant, is an absolute necessity. The undersigned can find no case in the United States which can be compared to the facts in the present case.

Respectfully submitted this 11th day of June, 1993.

/s/ JEROLD A. CARTIN
Attorney for Plaintiff-Appellant

COPY of the foregoing mailed
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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARIE J. SMITH, a single woman, Plaintiff-Appellant, vs. U.S. VETERANS ADMINISTRATION, an Executive Department of the Federal Government, WILLIAM L. EBERLE, Chief, Personnel Service, Department of Veterans Affairs, Defendants-Appellees.	)	No. 92-15294 PETITION FOR RE-HEARING F.R.A.P. 40 EN BANC REQUEST

COMES NOW Petitioner, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, and asks that this Court grant a re-hearing because of its Memorandum Decision upholding the trial court, but for a different reason. En Banc consideration is requested because the circumstances of this case have created a question of exceptional importance. The Memorandum Opinion indicates that the Court recognizes the injustice done to Plaintiff-Appellate but adopts the position

that its hands are tied. In its decision, a material point of fact or law has been overlooked. This Court has not dealt with the procedural misconduct committed by the federal agency. As hereinafter mentioned, this Court is referred to Hoeft v. T.U.S.D.C., 967 F.2d 1298. This Court's opinion does not make sense when viewed against the misconduct of the federal agency. Hence, the undersigned's request for an en banc consideration.

The Court has written a decision against Plaintiff-Appellate in spite of its recognition of the V.A.'s unfortunate treatment of her. The Court in its opinion is clearly recognizing and acknowledging the failure of due process. That is to say, there is a recognition of the failure of due process, at least until the V.A., two months after this lawsuit was filed, advised Mrs Smith of her right to appeal to the Merit Systems Protection Board. If this law suit had never been filed, could Plaintiff have

appealed to the Merit Systems Protection Board five years down the road?

The holding of this Court is that the lower court had no subject matter jurisdiction over this case. This Court is holding that under no circumstances would the lower court have jurisdiction over this case. This Court is saying that even if the V.A. had never advised Plaintiff-Appellate of her appeal rights to the Merit Systems Protection Board, the district court would still not have had jurisdiction over the subject matter. This Court cites in its opinion Title 5 of the U.S. Code dealing with this matter. This Court does not deal with the issue of the V.A. ignoring the procedural requirements. This Court is saying that it doesn't really matter what mistakes the V.A. made concerning the procedural matters because the district court did not have jurisdiction since congress has established an elaborate statutory remedy for civil service employees who contest their

terminations. This Court refers to an employee's ample protection from arbitrary action by a supervisor. Under the facts of this case, where is the ample protection when the V.A. is permitted to ignore the referred-to Title 5 requirements? It is fairly obvious from the Memorandum Opinion that this Court does not like what happened but is saying its hands are tied. Plaintiff-Appellate would have no objection if this Court certified this case to the United States Supreme Court for review. There is no question that if the V.A. had followed the correct procedures, the matter would have been reviewed by the Merit Systems Protection Board. Thereafter, the termination would have been before this Court. The undersigned submitted a statement regarding oral argument which this Court considered as a Motion for Reconsideration. It was pointed out that the underlying issue of termination because of lack of citizenship would have been before this Court if Plaintiff-Appellate had

received no relief from the Merit Systems Protection Board. Although that issue is in front of the Court right now, this Court is saying that it cannot be done this way because Plaintiff-Appellate did not pursue her remedies to the Merit Systems Protection Board, even though the record clearly shows what the V.A. did wrong. This Court could very well hold that the elaborate statutory remedy for civil service employees is exclusive and a U.S. District has no jurisdiction over the subject matter of a wrongful termination claim so long as the federal employer chooses to follow the elaborate statutory remedy.

Please reconsider this case against this Court's language in *Hoeft v. T.U.S.D.*, decided June 1993, 967 F.2d 1298. Judge Norris participated in that decision also. This panel apparently feels that "due process" and "abuse of discretion" are not involved in this case, even though the federal agency chose to ignore crucial statutory procedural "due process"

requirements. Perhaps a more informative opinion would help if it were explained why the trial court has no subject matter jurisdiction in light of the V.A.'s conduct. Perhaps the congressional intent of exclusivity of procedures is conditional for its invocation on the action of the federal agency in initiating the procedures at the correct time. If that were the case, absent correct procedural action by the agency, a district court would have subject matter jurisdiction.

Lastly, does this case hold open the door to appeal to the Merit Systems Protection Board in spite of the time constraint contained in the referred-to Title 5 sections? Or is the Plaintiff-Appellant estopped because of her mistake in seeking judicial relief? What about publishing the opinion for the sake of citation in other cases?

Respectfully submitted this 29th day of June, 1993.

/s/ JEROLD A. CARTIN
Attorney for Plaintiff-Appellant

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